MEMORANDUM

TO: Chairman and Commissioners

FROM: Commissioner Squires

CC: Commissioners' Assistants
Leslie Haynes
Barb Rogers
Scott Wiseman

DATE: May 7, 2002

RE: Proposed Revisions to the Written Decision in Docket No. 02-0160

As mentioned this morning at the Prebench Meeting, please see below for my proposed revisions to the Written Decision in Docket No. 02-0160. I have also provided a brief explanation of each revision as well as a response to Commissioner Kretschmer's memo dated May 6, 2002.

I) Penalties

The Commission should use the tools available to open local markets

As a preliminary matter, the Illinois Legislature recently acknowledged the concerns expressed by this Commission, among others, that the ICC possessed insufficient enforcement powers to thwart anti-competitive conduct of telecommunications carriers. The catch phrase during the rewrite process of Article XIII was that "Ameritech would rather pay the penalty than fix the problem." The legislature listened to the concerns and responded by dramatically increasing our enforcement powers. Part of this initiative included amendments to Section 13-516(a)(2) that were inserted to raise the penalties for repeated violations of 13-514 (*per se* impediments to competition). Section 13-516(a)(2) also allows the Commission to levy fines based on the duration of the violation. Although these new enforcement powers should aid in our ability to break through roadblocks to competition, failure to employ these powers correctly could render this major initiative of HB2900 effectively useless. Moreover, as illustrated below, some interpretations of Section 13-516(a)(2) would do just that. Therefore, when deliberating this issue, I urge my fellow Commissioners to employ the powers that were granted to us by the Illinois Legislature just 10 short months ago.

Response to Commissioner Kretschmer's Executive Assistant's Memo

I appreciate the information circulated by Commissioner Kretschmer regarding the penalties issue – and I agree wholeheartedly that the Commission determination on

this case of first impression can have significant ramifications. I would, however, like to make a few points that my fellow Commissioners may find informative.

- **The statutory language on its face is ***not*** clear**: although the ALJ explained her rationale according to her interpretation, she also explained in her cover memo that other interpretations of Section 13-516(a)(2) could be warranted (*see* Cover Memo of ALJ Haynes, April 23, 2002).
- **Counting violations of 13-514 separately does not infringe on Ameritech's due process:** I disagree with any assertions that counting 13-514 violations separately somehow infringes on Ameritech's due process. The record evidence shows that Ameritech has had knowledge of the Line Loss Notification (LLN) problems for a year and Z-Tel provided the legislatively-mandated 48-hour notice in mid-February. Thus, Ameritech has had ample time to respond and rectify the problems *which have yet to be resolved*. In fact, the legislature explicitly recognized the 48-hour notice as a significant date in calculating penalties (see Section 13-516(a)(2)). In short, Z-Tel provided the appropriate notice, the Commission has abided by the expedited time-frames, and the law allows for assessing penalties from the day notice was provided to Ameritech pursuant to Section 13-515(c). Ameritech's due process has not been violated regardless of how Section 13-516(a)(2) is interpreted by this Commission.
- **The "Strawman" Argument:** Commissioner Kretschmer's assistant's memo asks the question, "If 13-514 violations are not counted individually for the purposes of levying fines, how do we define 'a second and subsequent offense'?" I suggest that the law already includes this information. What is ignored in the above question is that Section 13-516(a)(2) actually refers to, "a second and any subsequent ***violation of Section 13-514***…". In this instance, we have 4 separate violations of Section 13-514, suggesting that the conduct of Ameritech was relatively destructive to competition.[1] I don't disagree that "…the legislature intended for the 'nature' of the wrongful conduct to be considered…". However, as is apparent from the amendments to Section 13-516(a)(2), the legislature wanted the nature of the conduct to be defined according to the egregiousness of the wrongful conduct (i.e., number of 13-514 violations) as well as its duration (i.e., number of days).
- **Incentives to Prevent Future Anti-Competitive Conduct:** I also disagree with the contention that Commissioner Kretschmer's assistant's proposed interpretation of Section 13-516(a)(2) provides a strong incentive for Ameritech not to engage in future anti-competitive conduct. In fact, using this interpretation, fines could not be imposed under 13-516(a)(2) for Ameritech's LLN problems until two completely separate and

[1] In my opinion, the number of violations of Section 13-514 is positively correlated with the damage incurred by the competitor.

successful 13-514 complaints were decided by this Commission.[2] This could take months, if not years, to occur – while each day, Z-Tel or another carrier (and the competitive environment as a whole) is harmed and at the same time the ICC has interpreted Section 13-516(a)(2) to strip itself of authority to impose penalties for this conduct. This outcome entirely defeats the purpose of Sections 13-514/515/516, which were enacted to bring a swift resolution to anti-competitive conduct. This outcome is also contrary to the recent amendments to Section 13-516(a)(2), which were inserted to allow the Commission to levy fines for such behavior.

?? **The amendments to Section 13-516(a)(2) will likely be useless under the interpretation proposed by Commissioner Kretschmer's Assistant:** It is apparent that, according to this interpretation, in order to trigger a second violation of Section 13-514, a CLEC must bring not only a second Section 13-514 complaint against Ameritech, but it must also be related to Line Loss Notification. Even if the Commission requires a separate complaint proceeding to trigger Section 13-516(a)(2), I strongly suggest that we not accept this interpretation. This is not the interpretation the ALJ apparently makes in her Written Decision,[3] and in fact, this interpretation is not supported by a plain reading of Section 13-516(a)(2) that states, "The second and any subsequent violation of Section 13-514 need not be of the same nature or provision of the Section for a penalty to be imposed." **A possible result of this interpretation would be for Ameritech to be found in violation of 40 Sections of 13-514 for 10 separate complaints related to different anti-competitive conduct (i.e., 4 violations per complaint), and the Commission will still be precluded from assessing penalties under Section 13-516(a)(2)**. As unlikely as this scenario seems, it is even more unlikely under Commissioner Kretschmer's assistant's interpretation, that the Commission will ever be allowed to assess penalties under Section 13-516(a)(2).

My proposal

As previously mentioned, this is a case of first impression, and as recognized by the ALJ, more than one interpretation could be warranted. Considering the shortcomings of the interpretation proffered by the ALJ and supported by Commissioner Kretschmer listed above, I recommend that the Commission count each violation of Section 13-514 separately. Applying this proposal to the instant docket, Ameritech would be subject to penalties for the 2nd, 3rd, and 4th violations of Section 13-514 in this instance. This would grant Ameritech "one free bite at the apple" consistent with Section 13-516(a)(2), while penalizing Ameritech for anti-competitive conduct. Please

[2] To avoid penalties under Section 13-516(a)(2) for its LLN, Ameritech could wait until it receives 48-hour notice for the second complaint before it rectifies the problem.

[3] Finding Paragraph #9 in the Written Decision states, "in *any* future proceeding where Ameritech is found to be in violation of Section 13-514 of the Act, the Commission may impose penalties." *Emphasis added.*

note that if Ameritech's LLN problem only violated one section of 13-514, we could all agree that no penalties should be assessed in this docket. However, Ameritech's conduct was more egregious and the Company violated 4 separate sections of 13-514. Please note also that I am not necessarily advocating assessing the maximum fine. The Commission was granted latitude by the Legislature to consider mitigating factors and assess fines up to a specific cap. These issues are better left for a subsequent penalty docket. To this end, please see proposed revisions to the Penalties section in Attachment 1. Please note that this recommendation is subject to change based on the opinion provided by our Office of General Counsel.

II) Parity Requirement

The proposed written decision (PWD) finds that Ameritech provides discriminatory Operations Support Systems (OSS) to Z-Tel, but does not rectify the discrimination. The record demonstrates that Ameritech not only discriminates against Z-Tel when compared to Ameritech's "Winback" personnel, but when compared to Ameritech's retail operations as well. Yet the only discrimination the PWD resolves is the discrimination between Z-Tel and Ameritech's Winback personnel. When vertically integrated utilities such as Ameritech operate in a competitive market, the proper comparison to be made when judging discrimination is the treatment a competitor receives versus the treatment Ameritech's retail operations receive. This comparison is wholly consistent with FCC rulings and Illinois law with regard to OSS access. The PWD fails to address this discriminatory treatment.

When compared to the Line Loss Notification (LLN) Z-Tel receives, Ameritech's Winback personnel get a superior disconnect notice and Ameritech retail operations get an even more superior ASON access. While the PWD rules that Ameritech must provide Z-Tel with the disconnect notice provided to Ameritech Winback, it does not require Ameritech to also provide identical OSS information (i.e., ASON information) as Ameritech retail receives. Therefore, I suggest that the Commission remain consistent with past policy and federal and state rules, and require Ameritech to provide Z-Tel nondiscriminatory OSS access. This would entail Ameritech providing an instantaneous, mirror copy of the OSS record generated by Ameritech's ASON database when a change is made to the customer's service record. Similar to the option embodied in the PWD that would allow Z-Tel to choose between the LLN and the enhanced LLN, my proposed revisions would provide Z-Tel the option to choose between the LLN and the identical OSS information that Ameritech's retail operations enjoy. Therefore, Ameritech would still need to rectify its LLN problems. To this end, I recommend that we adopt Z-Tel's proposed revisions regarding parity (*see* Z-Tel's Petition for Review, Exhibit A, pp. 2-3; *see also* Attachment 1 to this memo).

III) Z-Tel's Role

Z-Tel obviously has a vested interest in ensuring that Ameritech provides timely, accurate, non-discriminatory line loss notification information. As the PWD observes, the wholesale performance measure for LLNs is not adequately measuring LLN failures. The PWD appropriately requires Ameritech to provide a report to Staff describing its

efforts in correcting problems with the accuracy of the performance measure. However, the PWD does not allow Z-Tel to participate in the process. Since Z-Tel's data was used, in part, to determine that there was a problem with the performance measure, I believe that it would be appropriate and useful to allow Z-Tel an opportunity to help ensure that the problem is rectified. Therefore, I recommend adopting Z-Tel's proposed language regarding Performance Measure (MI 13) [*see* Z-Tel's Petition for Review, Exhibit A, pg. 6, *see also* Attachment 1 to this memo].